IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 982 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

HEMTAJI KADVAJI

Appearance:

1. Criminal Appeal No. 982 of 1985
MR RM CHAUHAN,APP for Petitioner No. 1
NOTICE SERVED for Respondent No. 1-4

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 31/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The State of Gujarat, in this appeal, has challenged the judgment and order dated 5.6.1985 passed in Sessions Case No.1 of 1985 by the learned Addl. Sessions Judge, Sabarkantha at Himatnagar, acquitting the respondents accused for offences punishable under sections 302-34, 452-34, 325 and 323 read with section 34 and section 504 of IPC.

2. The prosecution case, in nutshell, can be stated as under:

The deceased Becharji Kadvaji was residing at village Rajli of Modasa taluka at the time of the incident which took place on 21.7.1984 with his wife Mangu, PW 7 and his minor son Takhaji, also the informant in the present case, examined as PW 3. A/1 Hemtaji and A/2 Dhulaji are the brothers of deceased Becharji Kadvaji while A/3 Jayanji Dhulaji is the nephew of the deceased residing in the house adjoining to the house of the deceased. The relations between the deceased and his brothers were not cordial and quarrel used to take place between them. It is the prosecution case that on 21.7.1984, while the deceased, after taking meals with his family, was sleeping in the open space of his house at about 12.00 midnight, A/1 came there and gave abuses to the deceased. He also gave a stick blow on the deceased. The deceased and his family raised cries and went inside the house and closed the door by applying latches. Thereafter A/1 went away. However, other accused came thereafter. It is the further case of prosecution that A/2 started removing the door with an axe and A/4 climbed the roof of the house and removed tiles and insisted that the deceased should come out. A/2 and A/3 thereafter opened the door and dragged the deceased and his wife out of the house and thereafter all the accused assaulted with axe and sticks. The deceased fell down on the ground. Accused also removed clothes of the deceased and made him naked. On hearing shouts, Gobar Kadva PW 11, Manga Kodar PW9 and Dhula Jetha PW 10 came there. It is the prosecution case that the said incident took place on account of goat of the deceased having grazed on the land of A/2 a week before the incident. Thereafter PW 10 and PW 11 informed Taluka Panchayat Sarpanch Maganbhai Pujara, PW 8 about the incident. PW 8 came to the scene of offence and found A/1 lying in the open space in a bleeding condition. The deceased was also lying on the ground in bleeding condition. He thereafter went to the milk dairy and telephoned at Dadhaliya Outpost at about 12.45 a.m. On the basis of the said information, Head Constable

Jagatsinh, PW 13 reached Rajli village and took both the injured in a cart to village Isarol from where the deceased was taken to Modasa General Hospital. Minor son Takhaji also accompanied them. PSO of Modasa Rural Police Station took down the complaint given by the informant Takhaji and registered the offence. The deceased was given primary treatment at General Hospital, Modasa and thereafter he was shifted to Civil Hospital,Himatnagar and from there, he was again shifted to Civil Hospital, Ahmedabad where he was examined by Dr. Kamlesh Shah at about 5.25 p.m. on 21.7.1984. However, the deceased succumbed to the injury on the same day. Dr.Pankaj Shirolawala, PW 18 performed the postmortem of the deceased at 8.30 a.m. on 22.7.1984. Initially, the investigation was carried out by Head Constable Jagatsinh. However, after the death of the deceased, PSI Vasudiya, PW 15 took over the investigation and thereafter Senior PSI Belim, PW 16 carried out investigation.

3. After completion of the investigation, chargesheet was filed against the accused before the learned Judicial Magistrate, First Class, Modasa who in turn committed the case to the Court of Sessions for trial. The charge Ex. 2 was framed against the accused to which they pleaded not guilty and claimed to be tried. The defence was of total denial.

4. The learned trial judge, after appreciating the evidence on record, including the further statement of the accused, was of the view that the prosecution has failed to establish the charge against the accused beyond reasonable doubt and, therefore,acquitted the accused. Hence, the present appeal.

5. The learned APP Mr. R.M.Chauhan, after taking us through the entire record, submitted that the learned judge has committed an error in acquitting the accused. He submitted that the learned trial judge erroneously rejected the evidence of the informant Takhaji and Bai Mangu, son and wife of the deceased who were present at the time of the incident. In the submission of learned APP, there was no reason for the complainant to falsely involve the accused.

6. The respondents, though served, have not engaged a lawyer to represent them.

7. We have minutely examined the evidence of informant Takhaji as well as Bai Mangu, the widow of the deceased who are the main witnesses of the prosecution.

Except their evidence, there is no direct evidence against the accused.

8. The informant Takhaji is examined at Ex. 21. In his evidence, he has stated that all the accused came at about 12.00 midnight when he and his father and mother were sleeping in open space of the house. According to him, A/1 came with a stick giving abuses while A/2 was having axe and a dharia. A/1 inflicted stick on the head of his father and thereafter they had gone inside the house and closed the door by applying latches. He has further stated that A/2 started giving blows with axe on doors. A/4 came thereafter. According to him, A/4 climbed the roof of the house and he was giving abuses. After the door was broke opened, they dragged his father and mother from the house. Thereafter A/2 inflicted blow with axe, A/3 with dharia and A/4 with a bow and arrow. His father fell down and his clothes were removed by the accused. He shouted for help. Thereafter Magan, Mukhi and Gobarji Kadvaji came there and telephoned from the deli. Thereafter an officer from village Dadhaliya came. They took his father in a cart to village Isrol from where he was taken to Modasa General Hospital where he lodged the complaint Ex. 43. There is material difference in the story given by this witness in his evidence and the complainant. In the complaint, the complainant has stated that initially, A/1 came to his house and inflicted a blow with stick. Thereafter he and his family locked themselves in a room. He has specifically stated that thereafter A/1 had gone to his home and thereafter only, A/2, A/3 and A/4 came and they broke open the door and caused injury to his father and mother. In the evidence, he has shown the presence of A/1 all throughout and he having participated in the entire incident. This witness has not stated in the complaint about A/3 coming with dharia and A/4 having caused injury to his father with bow and arrow. He has also not stated in his complaint that A/3 and A/4 had given fist blows to his father. He has also not stated in his complaint that when Sarpanch came to their house, he had informed him about the incident nor had he informed the Head Constable of Dadhaliya village about the incident nor he stated about the people having gathered there on hearing shouts. Even if we ignore these minor things considering his age, in view of the fact that his mother Bai Mangu had stated in her evidence that because of fear, immediately after the incident, she had gone to her brother's place, the evidence of informant Takhaji has become relevant inasmuch as he is the person who had remained in the house after the incident and naturally, the persons gathered there to

inquire about the incident from him. We have got our own doubt regarding the presence of this witness at the time of the incident. This is in view of the fact that this witness Takhaji had not stated anything about A/1 having sustained injuries at the hands of his father.

9. Maganji Somaji Pujara, PW 8 Ex.30, Member of Taluka Panchayat, in his evidence, has stated that on being informed by Udaji and Gobarji about the quarrel having taken place between the brothers, he had gone to the spot and found A/1 lying on the ground near the house of the deceased and even the deceased was also lying in naked condition in the open space of his house. Both were profusely bleeding. He thereafter informed Dadhaliya Outpost on telephone and the Head Constable came there at about 2.45 a.m. who took both the injured to village Isrol and thereafter in a tractor, they were taken to Modasa where they were treated in Govt Hospital. Not only that, both were thereafter taken to Himatnagar Hospital.

10. Dr. Kamlesh Shah, PW 1, Medical Officer, Civil Hospital, Ahmedabad, in his evidence, has also stated that Hemtaji, A/1 was transferred to Civil Hospital, Ahmedabad from Civil Hospital, Himatnagar and he had examined him on 21.7.1984 at 5.45 p.m. He found the following injuries.

"A small CLW over right front of chest diffuse swelling. Surgical emphysema present.
A supportive bandage over right hand and right forearm. Small incised wounds over left index, middle and ring fingers, proximal phalanx. Size varies 1/2" to 1" long x sup. to skin deep."

He has issued certificate Ex. 15. He has also stated that A/1 was admitted as an indoor patient on 21.7.1984 and discharged on 6.8.1984 and operation was also performed. Therefore, it is clearly revealed that the A/1 had also sustained serious injuries. However, the informant Takhaji has conveniently omitted to narrate the genesis of the incident. He has also not explained the injuries sustained by A/1. Therefore, a doubt will certainly arise regarding the presence of informant at the time of the incident.

11. As stated above, Maganji Somaji, PW 8 had telephoned Police Officer of Dadhaliya Outpost. Head Constable Jagatsinh who received the message entered the said information in telephone book which is produced at Ex. 41. The said entry reads as under:

"Today, while performing my duty of taking a round at 2.00 a.m. in village Dadhaliya, when I was sitting on the 'ota' of the Outpost, information was received at 2.45 a.m. on telephone from Maganji Somaji of Rajali village informing that Parmar Becharji Kadvaji of Rajli village had inflicted dharia blow on the hand of his brother Hemtaji Kadvaji. Becharji Kadvaji also sustained injuries at the hands of these persons and was lying in naked condition at his residence. The said information is noted down."

In our opinion, the information regarding cognizable offence was disclosed and the said information could have been registered as FIR. Be that as it may. From the said information, it is clear that the incident happened not in the manner suggested by the informant Takhaji. Thus, the evidence of Takhaji is not at all reliable and trustworthy.

12. Mangu, wife of the deceased, is examined as PW 7 Ex.29 as an eye witness. She, in her evidence, has stated that on the night of the incident, while they were sleeping in the open portion of their house, A/1 came there with stick giving abuses and he gave a stick blow to her husband. Thereafter, she, her husband and her son had gone inside the house and closed the door by applying latches. Suddenly A/4 came there with spear and removed the tiles. A/2 broke opened the door with the help of axe. They dragged her and her husband. All the four accused thereafter started beating her husband. A/2 inflicted axe blow on the head as well as on the hand of her husband while A/1 gave a stick blow and A/3 gave dharia blow. A/4, with spear, inflicted blow on the mouth as a result of which the teeth came out. She was also beaten by A/1 with stick and A/3 and A/4 gave her fist blows. Her younger son Rana was also beaten. She has stated that out of fear, she ran towards her maternal house. She was admitted in Modasa Hospital on the next day where she remained for 17 days. She has admitted in her cross examination that she had not stated in her statement before police that A/1, after inflicting stick blow, came back with other accused and thereafter he had beaten her husband. She has also admitted that she had not stated in her police statement that A/3 inflicted dharia blow on her husband. She has also admitted that she had not stated in her police statement that A/4 was having a spear and with it, he had broken the teeth of her husband. She has also admitted that she had not stated before the police that A/1 had given a stick blow to her nor A/3 and A/4 had given her fist blows nor her

younger son Rana was beaten. Thus, she has substantially improved her version in the evidence.

13. Reading her evidence, we have our own doubt regarding her presence at the time of the incident. Even though according to her, she sustained injuries and that her husband was seriously beaten, it would be highly improbable for a lady to leave her husband in such a condition. Even though she comes forward with a case that because of the injuries sustained by her, she had to remain in the hospital for 17 days, there is nothing on record to substantiate the same. No medical evidence worth the name is produced in the instant case regarding the injuries on the person of Mangu. The fact that she was not made the complainant and instead, her minor son was made the complainant and that too, on the next day, would certainly raise a doubt regarding her presence at the time of incident. Apart from that, the evidence of Mangu does not get any corroboration from the medical evidence as far as the injury on the deceased is concerned. Dr. Pankajkumar, PW 2 Ex. 18 who performed postmortem examination of the deceased has clearly opined that for sutured injuries, it was not possible for him to say as to what weapon was used. He has admitted that the injuries which are not sutured are possible by hard and blunt substance. Surprisingly, the prosecution has not produced the evidence of doctor of Modasa General Hospital who noticed the injuries of the deceased at the earliest point of time. In absence of the same, the prosecution has not been able to establish beyond reasonable doubt that the deceased sustained injuries with sharp edged weapons. Thus, there is no corroboration to the evidence of Bai Mangu.

14. Apart from that, like the informant, this witness Bai Mangu also does not explain the injuries sustained by A/1 and on the contrary, she has specifically stated in her evidence that she did not see any injury sustained by A/1. Thus, in our opinion, the evidence of Bai Mangu also does not support the prosecution.

15. In view of the fact that A/1 and deceased both sustained injuries, it appears that the quarrel must have taken place between two brothers. However, it is not clear as to who started quarrel and who exercised the right of private defence. From the evidence of prosecution, it is clear that both the brothers used to fight often and, therefore, the possibility of falsely involving the accused also cannot be ruled out.

16. In the instant case, the prosecution is also

unable to prove the panchanama of the scene of offence Ex. 23 to establish the hammering on the door as the panch Amaraji Motiji, PW 4 Ex. 24 has not supported the prosecution case and the prosecution has declared him hostile. Similarly, recovery of blood stained axe at the instance of A/2 is also not proved as the panch Amraji Motiji has not supported the prosecution. Therefore, the evidence of Head Constable Jagatsinh remains uncorroborated. From the report Ex. 36 of FSL regarding axe, it is clear that even though the blood was found on the axe, the group of blood has remained undecided and, therefore also, it is not established that the axe was used in the commission of offence.

17. Thus, taking the overall view of the matter, we are in total agreement with the reasonings and the ultimate conclusion reached by the learned trial judge in passing the order of acquittal.

18. There being no substance in this appeal, it is dismissed. Bail-bonds stand cancelled.

(Kshitij R.Vyas,J.)

(Kamal M.Mehta,J.)

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